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No. 326

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

JERRY M. GRAY, et al.,
Appellants,

v.

THE STATE OF WEST VIRGINIA,
Appellee.

APPELLANTS' BRIEF OPPOSING "MOTION OF THE STATE OF WEST VIRGINIA TO AFFIRM THE JUDGMENT BELOW OR DISMISS THE APPEAL IN THE ABOVE ENTITLED CAUSE", PURSUANT TO PARAGRAPH 3, RULE 12, AND PARAGRAPH 3, RULE 7 OF THE RULES OF THE SUPREME COURT.

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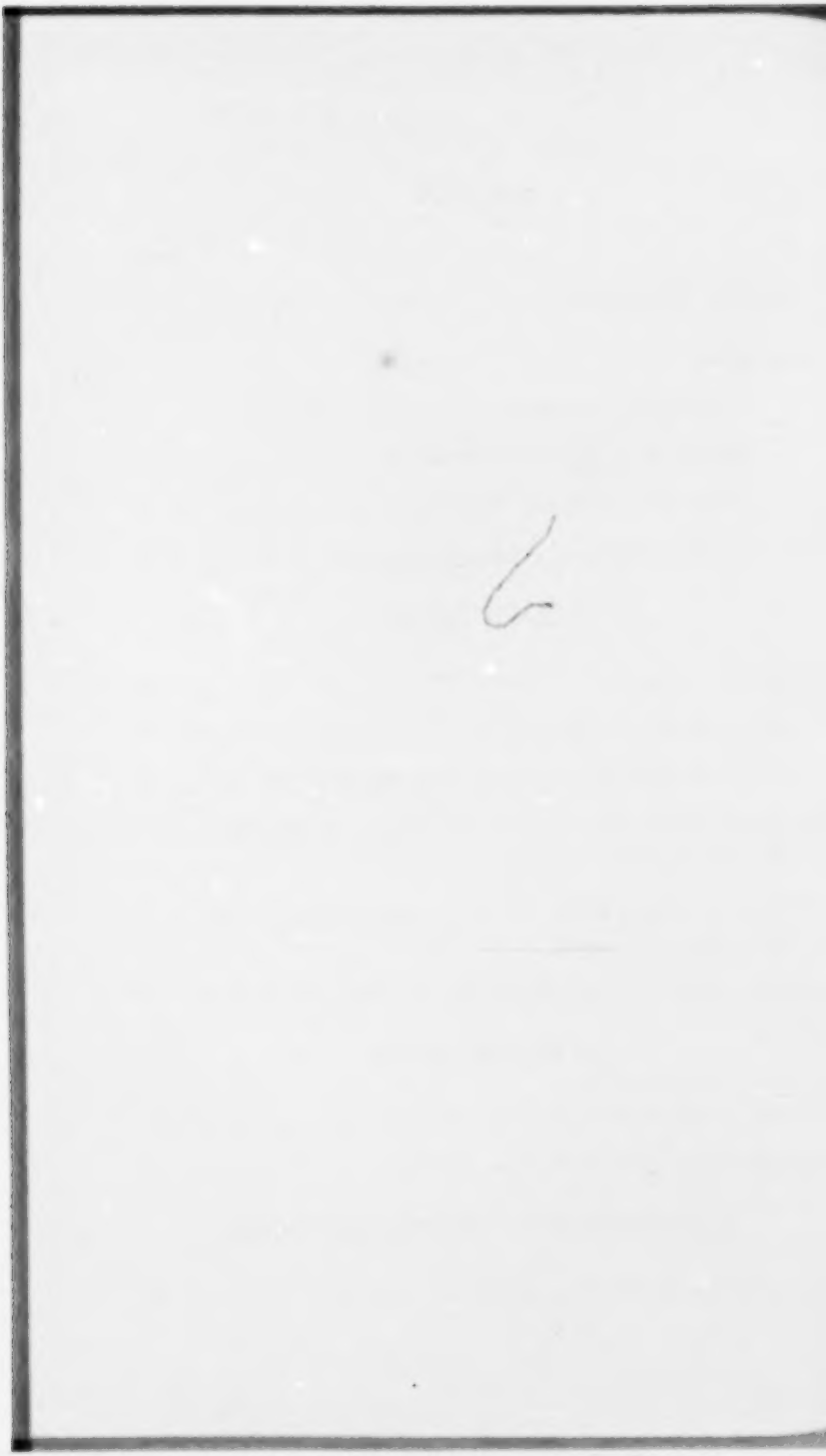

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SUMMARY STATEMENT

Neither the motion nor the statement opposing jurisdiction filed by the appellee herein claims that the Supreme Court of the United States lacks jurisdiction to grant or hear this appeal, but only that "the record made in this case presents no substantial federal question", thus appealing to discretionary power of the Court to refuse to hear this appeal. The only point to be answered, therefore, is whether the questions presented are substantial, thus justifying the Court in proceeding to hear the appeal already granted.

We will now consider the grounds in the order assigned by the appellee's motion.

ARGUMENT

I

The appellee's statement is as follows:

> "The ground of jurisdiction as stated by appellants which relates to an alleged violation of the Fourteenth Amendment of the Constitution of the United States, in that appellants were denied an opportunity in a judicial proceeding to contest the validity of the State's title to the lands included in this suit and sought to be sold in the names of appellants as former owners, is improperly asserted since as appears from the record made in this case appellants were served by publication and made a general appearance thereby waiving service of process."

This statement, especially when read in the light of appellee's "Statement Opposing Jurisdiction", which actually is drafted as a brief in support of the motion, misconceives and omits the most serious and substantial feature of this ground of jurisdiction. In order that this feature may clearly appear, let us admit for the moment, for the sake of argument only, that Chapter 160, Acts of West Virginia of 1947, provides notice and opportunity to be heard in a judicial proceeding sufficient, when considered alone, to satisfy due process—but what benefit are these after the state has already, by Section 12, seized, confiscated and appropriated unto itself the "absolute title" and declared that "the former owner . . . has no further interest therein nor rights in respect thereto". After such a legislative forfeiture, the so-called notice, the so-called opportunity to be heard and the so-called judicial proceeding are but empty jestures toward constitutional pro-

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cess. It is submitted that under this legislative forfeiture the State can even claim immediate possession of the land and have an action of ejectment or unlawful detainer to oust the owner.

The appellee's "Statement Opposing Jurisdiction" points to Section 19 of the statute involved which authorizes persons substantially interested to come into the suit and ask for a dismissal under certain circumstances. But how can the court protect them when the court is bound by the statute declaring absolute title in the state and no right or interest in the former owner? Or for that matter, how could there be "any person substantially interested" after this legislative forfeiture has operated?

It should be noted that the West Virginia Constitution, Article XIII, Section 4, does not require that the State must have "absolute title" before it sells for its taxes; nowhere does it even use the term "absolute title". The language of the Constitution is that the title "become irredeemable, not redeemed, released, transferred or otherwise disposed of". This laguage gives plenty of room for all rights claimed for the owner, but the legislative declaration of forfeiture of "absolute title" does not.

On the subject of notice alone, the court below made it a point of decision as to these appellants. So it cannot be dropped here. Great stress is laid by appellee, in its "Statement Opposing Jurisdiction", that in the majority opinion below the court held that personal service on resident former owners is mandatory under Section 12. But the appellee failed to note that the W. Va. Legislature by Chapter 134, Acts of 1949, enacted *retroactively* that resi-

dent owners need not be named or personally served, and even dropped the form of summons for personal service on resident former owners, thus approving a publication without naming the party as sufficient notice on resident owners. Consequently, notice alone becomes a substantial federal question.

In *King* v. *Mullins* (1898) 171 U. S. 404, 18 S. Ct. 925, 43 L. Ed. 214, this Court was required to pass upon the due process of the statutes of West Virginia of 1882 amended through 1893, on this same subject. This Court held that these statutes did not violate due process because, as we understand the decision, the statutes provided:

> 1. "That the sale should be sought by petition filed by the commissioner of school lands in the proper circuit court, to which proceeding all claimants should be made parties, and be brought in by personal service of summons upon all found in the county, or by publication as to those who could not be found."
>
> 2. "That every such suit brought under the provisions of this chapter, the court shall have full jurisdiction, power and authority to hear, try and determine all questions of title, possession and boundary which may arise therein, as well as any and all conflicting claims whatever to the real estate in question arising therein."
>
> 3. "It thus appears that under the statutes of West Virginia in force after 1882 the owner of the forfeited lands had the right to become a party to a judicial proceeding, of which he was entitled to notice, and in which the court had authority to relieve him, upon terms that were reasonable, from the forfeiture of his lands."

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> 4. "If the state was not entitled to treat them as forfeited lands, that fact could be shown in the proceeding instituted for their sale as lands of that character, and the rights of the owner fully protected."

Now, Chapter 160 here involved does not afford the above protection to the former owner because he has been foreclosed in advance by the legislative declaration of forfeiture. Thus the federal question is substantial indeed and the King case is authority that due process is lacking.

II

The appellee's statement is as follows:

> "The ground of jurisdiction as stated by appellants which relates to an alleged violation of the obligation of contract in contravention of Section 10 of Article I of the Constitution of the United States, is improperly asserted in that the facts and record made in this case present no contract."

Again, this is an understatement. Our position is and always has been that the right of redemption is not only a contractual right but also a property right incident to the land and that under the W. Va. Constitution the right must be afforded.

Section 12 of Chapter 160 attempts to legislate the right or equity of redemption into "such privilege of redemption as may be extended to him by the legislature as an act of grace". In other words, grace may be exercised or it may not. If it is not, there is no right of redemption. But in the King case the right of redemption was

considered most important in sustaining the Act of 1882.

Appellee goes further (Statement Opposing Jurisdiction, page 10) and asserts, "if a contract did exist, the obligation thereof would not be impaired by the alteration of a purely remedial right". But this court said in *Bronson* v. *Kenzie*, 1 Howard 316:

> "Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution. This subject came before the Supreme Court in the case of *Green* v. *Biddle*, 8 Wheat. 1. * * * On the part of the demandant in that case, it was insisted that the laws of Kentucky passed in 1797 and 1812 concerning occupying claimants of land impaired the obligation of the compact made with Virginia in 1789. On the other hand it was contended that these laws only regulated the remedy, and did not operate on the right to the lands. In deciding the point the Court says: 'It is no answer that the acts of Kentucky now in question are regulations of the remedy and not of the right to the lands. If these acts so change the nature and extent of the existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests.' And, it should not be overlooked, it was due to a stable remedy afforded by statute to the former owner at the time of the forfeiture, that sustained our constitutional forfeitures. *King* v. *Mullins*, 171 U. S. 422, 427 and 434."

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III

The appellee's statement is:

> "The ground of jurisdiction as stated by appellants which relates to an alleged violation of an alleged contract or compact between the Commonwealth of Virginia and the State of West Virginia, is improperly asserted since the alleged contract or compact does not impose any limitation or restriction on the taxing power of the State of West Virginia."

This proposition is treated in the appellee's motion and statement and in the opinion of the court next below as some sort of attack upon the sovereignty of the state. But surely it is no surrender of sovereignty for a state to perform or be required to comply with its agreements.

This Court, in the King case above, plainly held that West Virginia is bound by that contract or compact in the following language:

> "The constitution of West Virginia provides that all private rights and interests in lands in that state derived from or under the laws of Virginia, and from or under the constitution and laws of West Virginia, prior to the time such constitution went into operate, should 'remain valid and secure, and shall be determined by the laws in force in Virginia prior to the formation of this state, and by the constitution and laws in force in this state prior to the time this constitution goes into effect.'
>
> "In view of this provision, it is proper to look at the legislation of Virginia and the decisions of its highest court touching the forfeiture of lands

> for noncompliance by the owners with the requirements of the law relating to taxation."

This Court held a similar compact between Virginia and Kentucky to be a binding agreement in *Green* v. *Biddle*, 8 Wheat. 1.

And the same thing has been held by West Virginia's highest court in *Sims* v. *Fisher* (1943) 125 W. Va. 512, 25 S. E. 2d 216, as follows:

> "Thus the law stood at the date of the formation of this State. Article IX of our Constitution of 1863, relating to forfeited and unappropriated lands, provided by Section 1 that private rights and interests in lands shall be determined by the laws theretofore in force in the State of Virginia . . ."

Now, just how far that contract or compact imposes a "limitation or restriction on the taxing power of the State of West Virginia" seems to us to be a very substantial federal question. It is so substantial in fact that this court must reverse its holdings in *Green* v. *Biddle*, *King* v. *Mullins* and *Bronson* v. *Kenzie* (supra) before it comes in agreement with appellee that "the alleged contract or compact does not impose any limitation or restriction on the taxing power of the State of West Virginia".

Just how much limitation, we believe is a subject for briefing, arguing and deciding on the merits—not on demonstrating a substantial ground of federal jurisdiction.

But we should add that we cannot subscribe to the proposition that compliance puts West Virginia in a condition of "serfdom", "bondage" or "vassalage" as con-

tended by appellee. West Virginia was collecting its taxes from 1882 to 1941 and in compliance with this agreement as held by this Court in the King case.

The appellee (Statement Opposing Jurisdiction, pages 12 and 13) places great stress upon excerpts from *Hawkins* v. *Barney's Lessee*, 5 Pet. 457, 8 L. Ed. 190, and *Kentucky Union Co.* v. *Kentucky*, 219 U. S. 209, 55 L. Ed. 183, 31 Sup. Ct. 171. But these two cases do not repudiate the compact between Virginia and Kentucky, nor do they hold that the contract is not binding—they hold the very contrary. But the burden of these two decisions is as to how far the compact is binding. And the holdings are that the new state is not restricted to the same language or the same insignificant detail, the same periods of limitations, etc., as the original statutes of the mother state. But these two cases make it clear that *Green* v. *Biddle* (supra) is still the law where "substantial rights incident to the title" are concerned.

IV

The appellee's statement is:

> "The right to surplus proceeds of sale accorded by Section 5 of Article XIII of the Constitution of West Virginia is not a vested right in the title to lands sold to the State for taxes or forfeited for non-entry for taxation and the acquisition by the State of absolute title to lands sold for taxes or forfeited for non-entry for taxation does not deprive the former owners of any property rights protected by the Fourteenth Amendment to the Constitution of the United States."

This right to surplus proceeds cannot be treated that lightly. West Virginia's own highest court in *Sims* v. *Fisher* (supra) had this to say about it:

> "But we think this right in the former owner, being constitutional under Section 5, Article XIII, furnishes a basis for the claim that the former owner is entitled to have the land, out of which he may expect something from the surplus, sold under the most favorable conditions. The general rule, as is well known, is that real estate is not usually sold in a judicial proceeding until the liens thereon are first ascertained and decreed; and that is a rule that may well be applied in the sale of land for the benefit of the school fund, to the extent that all questions of the right to sell the land be settled in advance of sale. The absolute right of the State to sell lands as forfeited and delinquent is, we think, limited to this extent and so limited by the Constitution."

Surely a very casual examination of Chapter 160 will show that the type of notice, the type of opportunity to be heard and the type of judicial proceeding afforded do not give the owner the protection for the owner's right to the surplus required by *Sims* v. *Fisher* (supra).

Whether this right is an interest in the title to the land or whether it is personalty would seem to be beside the point. Each specie of property has due process protection.

CONCLUSION

A great deal more might well be written on each of the above points. But we have tried not to repeat our State-

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ment of Jurisdiction. And likewise we have tried not to brief the merits beyond what is necessary for jurisdictional purposes, leaving a full treatment of the merits for the proper stage on this appeal.

It is insisted that, from our Statement of Jurisdiction, from this brief and even from the record itself, the substantial nature of the federal questions readily appear, and that appellee's motion should be denied.

Respectfully submitted,

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